

RECLAMATION GROUND WATER MANAGEMENT AND
TECHNICAL ASSISTANCE STUDY ACT OF 1988

AUGUST 25, 1988.—Ordered to be printedFiled under authority of the order of the Senate of August 11, (legislative day,
August 10), 1988

Mr. JOHNSTON, from the Committee on Energy and Natural
Resources, submitted the following

REPORT

[To accompany S. 2108]

The Committee on Energy and Natural Resources to which was referred the bill (S. 2108) to authorize the Secretary of the Interior to conduct the reclamation ground water management and technical assistance study, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended, do pass.

The amendment is as follows:

Strike section 2. (a) in its entirety and insert in lieu thereof:

SEC. 2. (a)(1) In furtherance of Public Law 99-434, the High Plains Ground Water Demonstration Program Act of 1983 (98 Stat. 1675), the Secretary of the Interior, acting through the Bureau of Reclamation and in consultation with the U.S. Geological Survey, shall conduct an investigation and analysis of the impacts of existing Bureau of Reclamation projects on the quality and quantity of ground water resources. Based on such investigation and analysis, the Secretary shall prepare a reclamation ground water management and technical assistance study which shall include—

(a) a description of the findings of the investigation and analysis, including the methodology employed;

(b) a description of methods for optimizing Bureau of Reclamation project operations to ameliorate adverse impacts on ground water; and

(c) his recommendations, along with the recommendations of the Governors of the affected States, concerning the establishment of a ground water management and technical assistance program in the Bureau of Reclamation in order to assist Federal and non-Federal entity development and implementation of ground water management plans and activities.

(2) In conducting the investigation and analysis, and in preparation of the study referred to in paragraph (1), the Secretary shall consult with the Governors of the affected States.

PURPOSE

As ordered reported, S. 2108 requires the Secretary of the Interior, acting through the Bureau of Reclamation and in consultation with the U.S. Geological Survey and the Governors of the affected States, to conduct an investigation and analysis of the impacts of existing Bureau of Reclamation projects on the quality and quantity of ground water resources. Based on such investigations and analysis, the Secretary shall prepare a reclamation ground water management and technical assistance study for submission to the Congress. The study is to include the Secretary's recommendations regarding the establishment of a ground water management and technical assistance program in the Bureau of Reclamation. S. 2108 authorizes the appropriation of \$4 million to carry out the study.

BACKGROUND AND NEED

During the past two Congresses, public and congressional attention have increasingly focused on the importance of ground water resources to our Nation's welfare. Over 120 million people, including 90 percent of rural American citizens are dependent upon ground water resources. While there is no question as to the apparent abundance of the resource, serious concerns have been expressed regarding the Nation's ability to protect it from contamination, to develop appropriate management techniques, and to develop a comprehensive data base.

Following 3 days of hearings before the Subcommittee on Water and Power,¹ three basic conclusions were evident. First, the Nation is not in a crisis situation with relation to ground water, rather we are at a very favorable point at which to address deliberately the question of how we can best manage our ground water resources over the long term. Second, prevention of contamination rather than treatment of already contaminated aquifers is the key element in any long-term protection plan for ground water resources. And, third, we need to augment and restructure Federal research and data gathering programs in order to provide information to the decisionmakers.

¹ Ground Water-Related Programs of the USGS and EPA (S. Hrg. 100-330); and Ground Water Resources and Related Management and Regulatory Activities in the State of New Jersey (S. Hrg. 100-482).

The Department of the Interior's Bureau of Reclamation is the preeminent water management agency in the 17 Western States. Bureau projects provide irrigation water supplies to upwards of 10 million acres and municipal and industrial water supplies for over 20 million people. Bureau project operations are key elements in the conjunctive management and use of surface and ground water resources. Following enactment of the High Plains States Ground Water Demonstration Program Act (Public Law 98-434), the Bureau, in cooperation with other Federal agencies and State and local governments, has undertaken a comprehensive research and development program to examine methods for aquifer recharge. The study authorized by the Reclamation Ground Water Management and Technical Assistance Study Act is a logical continuation and extension of the Bureau's current role in the management of western water resources and will assist the Congress and the Nation in addressing the concerns expressed during the hearings before the subcommittee.

LEGISLATIVE HISTORY

S. 2108 was introduced on February 29, 1988, by Senators Bradley and Moynihan. A hearing was held before the Subcommittee on Water and Power on June 9, 1988.

At the business meeting on August 4, 1988, the Senate Committee on Energy and Natural Resources ordered S. 2108 favorably reported.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on August 4, 1988, by unanimous vote of a quorum present recommends that the Senate pass S. 2108, if amended as described herein.

The rollcall vote on reporting the measure was 19 yeas, 0 nays as follows:

YEAS	NAYS
Mr. Johnston	0
Mr. Bumpers*	
Mr. Ford	
Mr. Metzenbaum*	
Mr. Melcher*	
Mr. Bradley	
Mr. Bingaman	
Mr. Wirth	
Mr. Fowler*	
Mr. Conrad	
Mr. McClure	
Mr. Hatfield*	
Mr. Weicker*	
Mr. Domenici	
Mr. Wallop	
Mr. Murkowski	
Mr. Hecht	
Mr. Nickles	
Mr. Evans	

*Indicates voted by proxy.

COMMITTEE AMENDMENTS

The committee amendment in the nature of a substitute to S. 2108 provides that the Secretary of the Interior shall consult with the U.S. Geological Survey and the Governors of the affected States in preparing the reclamation ground water management and technical assistance study. In addition, the committee amendment provides that water quantity as well as quality would be included in the Secretary's investigation and analysis of the impacts of existing Bureau of Reclamation projects on ground water resources.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 1988.

Hon. J. BENNETT JOHNSTON, Jr.,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 2108, the Reclamation Groundwater Management and Technical Assistance Study Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 2108.
2. Bill title: Reclamation Groundwater Management and Technical Assistance Study Act of 1988.
3. Bill status: As ordered reported by the Senate Committee on Energy and Natural Resources, August 4, 1988.
4. Bill purpose: This bill would direct the Secretary of the Interior to conduct a study of the impact of existing Bureau of Reclamation projects on groundwater quality and quantity. The report is to include the recommendations of the governors of affected states and the Secretary concerning the establishment of a Groundwater Management and Technical Assistance Program in the Bureau of Reclamation.
5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level.....	4				
Estimated outlays.....	3	1			

The costs of this bill fall within budget function 300.

Basis of estimate: We assume the \$4 million authorized in the bill to conduct this study will be appropriated, and that the study will be completed within two years as required by the bill.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Kim Cawley.

10. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2108. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the measure. Therefore, there would be no impact on personal privacy.

Other than the paperwork normally associated with the conduct of the type of study authorized by S. 2108, little, if any, additional paperwork would result from the enactment of S. 2108, as reported.

EXECUTIVE COMMUNICATIONS

On March 16, 1988, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on S. 2108. These reports had not been received at the time the report on S. 2108 was filed. When the reports become available, the chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the appropriate agency at the subcommittee hearing follows:

STATEMENT OF C. DALE DUVALL, COMMISSIONER, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR

Mr. Chairman, with respect to S. 2108, the "Reclamation Ground Water Management and Technical Assistance Study Act of 1987," the Bureau of Reclamation has the scientific and technical capability to conduct the proposed study and make recommendations concerning the effective management of water supplies.

We have no objection to authorization of the study.

However, the Bureau of Reclamation is currently involved in a number of programs directly related to the purposes of the proposed study.

Many existing Bureau projects are wholly ground water supply projects, have a ground water component, or were developed to deal with ground water problems. Historically, western States have relied heavily on ground water to meet their development needs for both agriculture and for

domestic, municipal and industrial development. Some examples of Bureau programs addressing ground water concerns are the High Plains States Ground Water Demonstration authorized by P.L. 98-434, the Colorado River Salinity Control Program, phreatophyte control for ground water salvage, irrigation drainage studies, provision of rural domestic water supplies, conjunctive use studies, and Safety of Dams investigations to control seepage and uplift forces and achieve drainage.

We are pleased to have the opportunity to testify concerning this legislation.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by the bill S. 2108 as reported.

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SOUTH DAKOTA WATER SUPPLY AND ASSISTANCE ACT
OF 1988

AUGUST 25, 1988.—Ordered to be printedFiled under authority of the order of the Senate of August 11 (legislative day,
August 10), 1988

Mr. JOHNSTON, from the Committee on Energy and Natural
Resources, submitted the following

REPORT

[To accompany H.R. 2772]

The Committee on Energy and Natural Resources, to which was referred the act (H.R. 2772) to authorize the Lyman-Jones, West River, and Oglala Sioux Rural Water Development Projects, having considered the same, reports favorably thereon with amendments and recommends that the act, as amended do pass.

The amendments are as follows:

1. On page 7, line 15, beginning with the word "days" strike all through the word "Congress." on line 17, and insert in lieu thereof the word "days."
2. On page 11, line 5, beginning with the word "days" strike all through the word "Congress." on line 7, and insert in lieu thereof the word "days."
3. On page 11, line 13, strike all through line 23 on page 12 and insert in lieu thereof the following:

The Secretary shall encourage the full consideration and incorporation of prudent and responsible water conservation measures in the operation of the West River Rural Water System, the Lyman-Jones Rural Water System, and the Oglala Sioux Rural Water Supply System where such measures are shown to be economically feasible. The non-Federal parties (including the Oglala Sioux Tribe) participating in the Systems shall develop a water conservation plan which shall contain definite goals, appropriate water

conservation measures, and a time schedule for meeting the water conservation objectives. The provisions of section 210(c) of Public Law 97-293 (96 Stat. 1268) shall apply with respect to the Systems.

4. On page 13, line 9, strike the phrase "or prior to".

5. On page 16, line 1, strike the word "Act." and insert in lieu thereof the following: "Act, plus or minus such amounts as may be justified by reason of ordinary fluctuations in development costs incurred after January 1, 1987, as indicated by engineering cost indices applicable for the type of construction involved."

6. On page 16, line 24, strike all through line 8 on page 17 and insert in lieu thereof the following:

(5) affect any water rights (including Winter's Rights), including the quantity or quality thereof, of any Indian or Indian Tribe if such rights were established by the setting aside of a reservation by treaty, Executive order, agreements, or Act of Congress or under aboriginal title except that nothing in this section or in this Act may be construed to validate or invalidate or in any way affect any assertion that any such rights or aboriginal title exist or does not exist or was heretofore extinguished.

7. On page 17, line 17, strike subsection (b) in its entirety and insert in lieu thereof the following:

(b) Feasibility Studies—Strike section 3 of Public Law 97-273 (96 Stat. 1181) and substitute in lieu thereof the following:

SEC. 3. The Secretary is authorized, in cooperation with the State of South Dakota, to conduct a feasibility investigation of the alternate uses of facilities constructed for use in conjunction with the Oahe unit, initial stage, James division, Pick-Sloan Missouri basin program, South Dakota, and to report to the Congress the findings of such study along with his recommendations.

PURPOSE

As ordered reported, H.R. 2772 authorizes the Secretary of the Interior to design, construct, and maintain the Oglala Sioux Rural Water Supply System and enter into cooperative agreements for the planning, financing, and construction of the West River Rural Water System and the Lyman-Jones Rural Water System; all three systems to be located in South Dakota. The Act authorizes the appropriation of \$87,500,000 for the planning, design, and construction of the three systems and also such sums as may be necessary for the operation and maintenance of the Oglala Sioux Rural Water Supply System. H.R. 2772 also authorizes the use of Pick-Sloan power for operation of the systems.

In addition, the Act directs the Secretary of the Interior to develop and submit recommendations to the Congress for the financing and implementation of mitigation plans for fish and wildlife losses incurred in connection with the construction and operation of the Oahe Dam and Reservoir and Big Bend Dam and Reservoir located

on the mainstream of the Missouri River in South Dakota. Finally, the Act repeals the authorization of appropriations for the Pollock-Herreid Unit of the Pick Sloan Missouri Basin Program and repeals the authority of the Secretary to conduct two water resource related feasibility investigations in South Dakota.

BACKGROUND AND NEED

The Lyman-Jones Water Development Association was formed in 1966 with the purpose of developing a water supply system to serve Lyman, Jones, and parts of Mellette and Stanley Counties. The West River Rural Water System, Inc. was organized in 1981 to develop a water supply system to serve Haakon, Jackson, and parts of Stanley and Pennington Counties. In Shannon County on the Pine Ridge Indian Reservation, the Oglala Sioux Tribe has long recognized the need to provide residents with a reliable potable water supply. The three entities have joined in proposing a regional project to address the needs of the residents of all three areas.

Although the three project sponsors are organizationally separate, the proposed projects would be interconnected and would utilize some common facilities to serve the residents of approximately 12,500 square miles in west central South Dakota (see figure 1). In recognition of this structural relationship as well as the commonality of purpose, the project sponsors have renamed the three systems the "Mni Wiconi" project which in the Lakota language means good water.

The Mni Wiconi project will serve an area which is subject to chronic water quality and quantity problems. Existing ground water supplies are high in dissolved minerals and safe drinking water standards for radium and fluoride are exceeded at some locations. Intensive treatment is required to make the water suitable for human consumption. In rural areas it is not feasible to treat ground water supplies used for livestock watering and the high mineral content impacts adversely on the livestock industry which is the primary source of income and employment over much of the area. Surface water supplies consist primarily of shallow stock watering ponds of questionable quality and which are unreliable sources during years of less than normal rainfall. In some areas, water has to be hauled for both domestic and livestock purposes. The Mni Wiconi project will address the somewhat differing needs of both municipal and rural consumers by providing a reliable supply of good quality water.

Of particular note are the needs to be met on the Pine Ridge Indian Reservation. While the previously described problems relating to water quality and quantity are found throughout the Mni Wiconi service area, conditions on the Pine Ridge Reservation are particularly severe. Approximately 20 percent of reservation households have no running water at all and of those that do, often the water quality is below acceptable standards. Economic and employment conditions on the Reservation are such that the only hope of providing a safe reliable supply of water is through the Federal assistance and regional cooperation embodied in H.R. 2772. Absent the enactment of H.R. 2772 and construction of the Mni Wiconi project, conditions may be expected to get even worse as the costs

of providing wells and related treatment increase and suitable sites for stock dams are "used up" because of siltation.

A reliable safe drinking water supply is one of the most basic requirements in achieving a reasonable standard of living. In addition to the obvious public health benefits which would result from operation of the Mni Wiconi project, it is anticipated that provision of reliable good quality water for livestock will materially add to the economic base of the region. In some areas, lands which would otherwise be used for grazing are planted to dry land crops because a suitable water supply is not available for livestock. Virtually all such dry land crops are "surplus" and therefore eligible for assistance under the acreage and production control programs of the Department of Agriculture. Provision of livestock water may result in a reversion of some of these lands to grazing purposes resulting in a reduction in surplus crop production.

THE MNI WICONI PROJECT

Project Facilities.—The Mni Wiconi project is designed to serve the needs of 13 municipalities and 12 Indian communities with a combined population of approximately 16,000 (10,000 Indian and 6,000 non-Indian). In addition, over 1,000 rural households will be served individually, with an estimated 75 additional rural households served through existing municipal or rural systems. Approximately 600 separate rural pasture locations will provide livestock water for the equivalent of 250,000 head of cattle.

The water source for the project is the existing Corps of Engineers' Oahe Dam and Reservoir on the mainstem of the Missouri River near Fort Pierre, South Dakota. The annual flow of the Missouri at this location is 18 million acre feet with upstream Federal storage of approximately 65 million acre feet. The average annual diversion of the Mni Wiconi project will be 3,500 acre feet with a system maximum capacity of about 30 acre feet per day when drought conditions prevail and demand would be higher than normal. The Corps of Engineers has granted preliminary approval to utilizing an existing powerhouse intake at Oahe Dam thereby providing a significant cost and operational advantage over construction of a new intake. From the powerhouse, a 30 inch pipeline will traverse the face of the dam and deliver by gravity flow a maximum of 7,000 gallons per minute to a water treatment plant to be located near Fort Pierre (See figure 2).

From the treatment plant, the treated water will be pumped through two major pipelines; one supplying the West River service area and the other both the Lyman-Jones and Oglala Sioux service areas. Because of changes in altitude, relief pumping plants will be located throughout the project. The most distant and highest elevations relative to the treatment plant are located within the Oglala Sioux service area and require a pump lift in excess of 2,000 feet. Storage on the Mni Wiconi project will be equivalent to about one maximum demand day of 6.7 million gallons. Transmission works will include approximately 200 miles of main pipelines, and over 2,000 miles of distribution pipelines.

Project Financial Data.—Project costs are summarized as follows:

Mni Wiconi project cost summary—October 1987 price levels

		Millions
Oglala Sioux Tribe rural water system:		
Pipelines and appurtenances.....		\$39.185
Pumping stations.....		5.545
Storage facilities.....		5.750
Primary electrical facilities.....		2.000
Subtotal, construction.....		55.720
Land and easements.....		.120
Legal services.....		.850
Engineering.....		3.550
Inspection.....		.850
Equipment.....		.275
Contingencies.....		3.635
Subtotal, other costs.....		9.280
Total cost, Oglala Sioux.....		65.000
West River rural water system:		
Pipelines and appurtenances.....		13.113
Pumping stations.....		.630
Storage facilities.....		.600
Primary electrical facilities.....		.300
Subtotal, construction.....		14.643
Land and easements.....		.050
Legal services.....		.150
Engineering.....		.950
Inspection.....		.450
Equipment.....		.120
Contingencies.....		1.152
Subtotal, other costs.....		2.872
Total cost, West River.....		17.515
Lyman-Jones rural water system:		
Pipelines and appurtenances.....		12.980
Pumping stations.....		.200
Storage facilities.....		.950
Primary electrical facilities.....		.300
Subtotal, construction.....		14.430
Land and easements.....		.050
Legal services.....		.150
Engineering.....		.940
Inspection.....		.430
Equipment.....		.120
Contingencies.....		1.365
Subtotal other costs.....		3.055
Total Lyman-Jones.....		17.485
System totals:		
Oglala Sioux.....		65.000
West River.....		17.515
Lyman-Jones.....		17.485
Total cost, Mni Wiconi.....		100.000

Cost of water from the Mni Wiconi project to the consumer in municipal areas is estimated to be in excess of \$3.00 per thousand gallons. Rural consumers will pay about \$4.00 per thousand gallons. Costs are high in comparison to other municipal water supply

systems (for example, the Washington Suburban Sanitary Commission residential rate is \$1.71 per thousand gallons) and particularly so when considering the relatively low incomes which predominate in the project service area. Indeed, section 2(a)(2) of H.R. 2772, states that Shannon County, the location of the Pine Ridge Indian Reservation, is the poorest county in the United States.

Project Financing.—Under the terms of the Act, non-Federal interests are required to contribute 35 percent of the costs allocated to the West River and Lyman-Jones Rural Water Supply Systems. Upon completion of the two systems, the non-Federal participants will be responsible for operations, maintenance, and replacement costs. This is similar to the cost-sharing and operational requirements for the WEB Rural Water Development Project (also located in South Dakota) which was authorized by Public Law 96-35 (44 Stat. 1175 as amended) and similar projects for rural development and undertaken by the Department of Agriculture. Non-Federal cost sharing is not required for the Oglala Sioux Rural Water Supply System and the Act authorizes to be appropriated such sums as may be necessary for the operation and maintenance of the Oglala Sioux Rural Water Supply System.

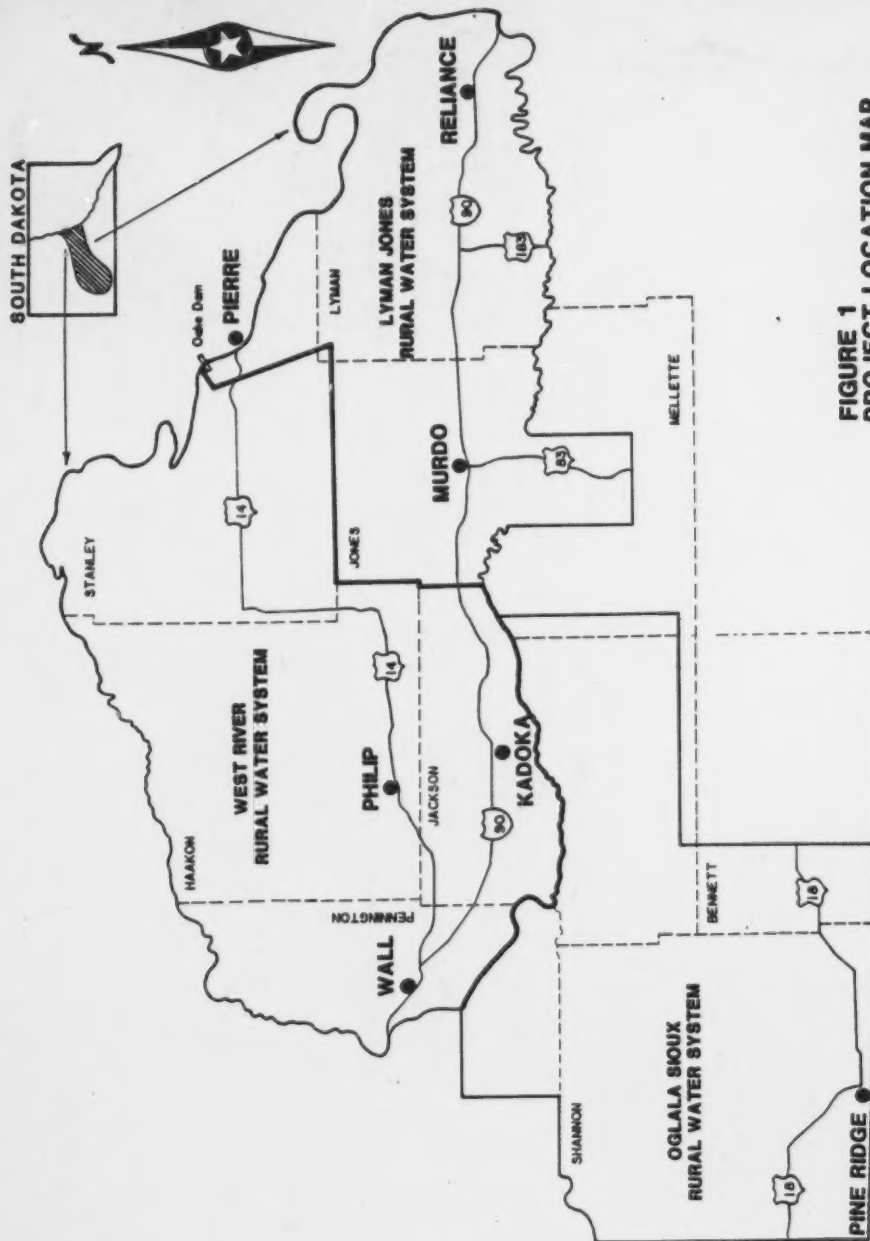


**FIGURE 1
PROJECT LOCATION MAP**

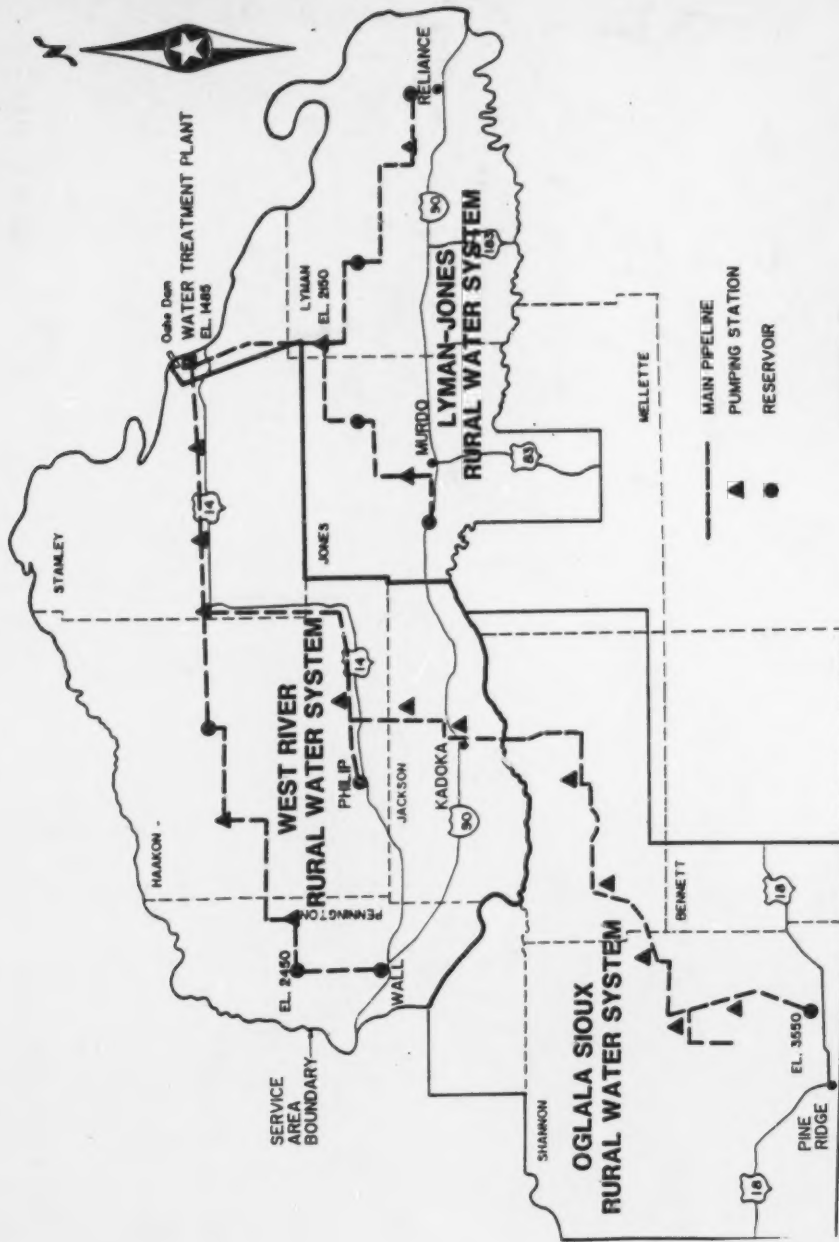


FIGURE 2
FACILITIES LOCATION MAP

LEGISLATIVE HISTORY

H.R. 2772 was introduced on June 24, 1987 by Congressman Johnson of South Dakota. The Act was referred to the House Committee on Interior and Insular Affairs where a hearing was held before the Subcommittee on Water and Power resources on December 15, 1987. H.R. 2772 was reported by the Committee on Interior and Insular Affairs on June 27, 1988 (Report 100-733) and passed the House on June 28, 1988. On July 6, 1988, H.R. 2772 was referred to the Senate Committee on Energy and Natural Resources.

A Senate companion measure, S. 1416, was introduced on June 24, 1987 by Senators Daschle and Pressler and was referred to the Committee on Energy and Natural Resources where a hearing was held before the Subcommittee on Water and Power on December 15, 1987.

In the 99th Congress, similar measures were introduced in both the House and Senate. The House bill, H.R. 3079 was introduced by Congressman Daschle and was the subject of a July 23, 1986 hearing before the Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs. The Senate bill, S. 1471, was introduced by Senators Pressler and Abdnor and was the subject of an August 25, 1986 hearing (S. Hrg. 99-1031) before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources. The 99th Congress adjourned before further action was taken on either bill.

At its business meeting on August 4, 1988, the Senate Committee on Energy and Natural Resources ordered H.R. 2772, favorably reported in lieu of S. 1416.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on August 4, 1988, by unanimous vote of a quorum present recommends that the Senate pass H.R. 2772, if amended as described herein.

The rollcall vote on reporting the measure was 19 yeas, 0 nays as follows:

YEAS—

Mr. Johnston
Mr. Bumpers¹
Mr. Ford
Mr. Metzenbaum¹
Mr. Melcher¹
Mr. Bradley
Mr. Bingaman
Mr. Wirth
Mr. Fowler¹
Mr. Conrad
Mr. McClure
Mr. Hatfield¹
Mr. Weicker¹
Mr. Domenici
Mr. Wallop
Mr. Murkowski

NAYS—

Mr. Nickles
Mr. Hecht
Mr. Evans

¹ Indicates voted by proxy.

COMMITTEE AMENDMENTS

The Committee adopted seven amendments to the text of H.R. 2772.

1. This amendment deletes the House requirement that no obligation of funds for construction of the Oglala Sioux Rural Water Supply System may be made by the Secretary until the Secretarial recommendations required by subsection 6(b) of the Act are submitted to the Congress. The recommendations required by subsection 6(b) address issues not related to the Oglala Sioux Rural Water Supply System. It is the Committee's view that any delay in the submission of the recommendations should not delay the construction of the Oglala Sioux Rural Water Supply System and the provision to the residents of the Pine Ridge Reservation of a reliable, healthful water supply.

2. This amendment is identical to the first amendment except that it applies to the obligation of construction funds for the West River and Lyman-Jones Rural Water Systems.

3. This amendment is based upon the water conservation language included in section 210 (43 USC 390jj) of the Reclamation Reform Act of 1982 (Act of October 12, 1982) applicable to irrigation systems. The provisions of H.R. 2772 as passed by the House present an unrealistic federal standard to be imposed on individuals in rural areas or anywhere else. The service area of the Mni Wiconi Project includes Shannon County, which is identified in section 2(a)(2) of the Act as "the poorest county in the United States." The project will divert on an annual average only 3,500 acre feet of water at a user charge in rural areas of approximately \$4.00 per thousand gallons or about \$1,300 per acre foot. The Committee believes that the cost of the water alone is sufficient to encourage conservation measures and that the authority contained in the House measure for the Secretary to withhold water deliveries to the systems for any violation of federally imposed standards is excessive and unwise. For example, the Secretary would be authorized to shut off water delivery to the Pine Ridge Reservation (which includes a clinic operated by the Indian Health Service) if anyone served by the system did not install fixtures meeting American National Standards Institute low consumption performance standards.

The Committee notes that the engineering report accompanying the proposal for the Mni Wiconi Project stresses that:

The rural water systems will discourage wasteful or excessive water use by the following measures:

1. Water meters on every connection to the water systems, including pasture taps.

2. "Flat rate" pricing which does not provide a lower incremental water cost for large water users.

3. Active observation by water system personnel to locate leaks on water system or consumer piping.

4. Monthly monitoring of consumer billings to identify those consumers with sudden changes in water use which may be indicative of leaking plumbing.

5. Regular newsletter reminders of the need to use water wisely."

4. This amendment retains the acre for acre ecological equivalency standard for fish and wildlife mitigation for the Systems, but requires that such mitigation be done concurrent with construction rather than "concurrent with or prior to project construction."

5. This amendment provides for indexing of construction costs. This is consistent with standard policy and takes into account any cost changes which are attributable to inflation or changes in costs for the type of construction involved. There is no justification to impose January 1, 1987 cost estimates with full knowledge that by the time the specific system authorized in this measure is funded, the Congress would have to enact a new authorization. The Committee notes that similar provisions apply to construction activities in the Territories and to accommodate increases in the cost estimates for acquiring lands for units of the National Park System.

6. This is a technical amendment. The language of the Act is intended to be a neutral hold harmless clause. This is a technical amendment to make it clear that the Committee is not considering within the context of this Act whether any such rights exist or ever existed, but simply to note that if such rights do exist, they are not affected by the Act. By including the term "aboriginal title" in the Act, the Committee is not expressing an opinion that such title exists, ever existed, or if it existed, was or was not extinguished. The Act is neutral. The Oglala Sioux Tribe has expressed to the Congress their concern that the legislation might affect their claims to water rights. The Committee wishes to make clear that the Act has absolutely no effect on any claims whatever the basis for such claims. The Committee also wants to make it clear that mentioning both "Winters" claims as well as aboriginal claims is not in any manner either a recognition of the existence of such rights or an endorsement of the claims. The Committee and the Act are neutral. The Committee is sympathetic to the concern raised by the Tribe and wishes to reassure the Tribe that the passage of this Act will not affect their claims in any manner. The Committee assures the Tribe that the Act is not to be construed or interpreted in any way as to affect the adjudication or quantification of the Tribe's water rights.

7. This is a technical amendment. The amendment retains the House intent of repealing the authority of the Secretary of the Interior to undertake certain feasibility studies but is rewritten as a specific amendment in order to provide for technical conformance with the Act being amended.

SECTION-BY-SECTION ANALYSIS

Section 1 is self-explanatory.

Section 2 is self-explanatory.

Section 3 authorizes the Oglala Sioux Rural Water Supply System and is self-explanatory in nature. The Committee would note however, that the Secretary shall not obligate funds for the

construction of the Oglala Sioux Rural Water Supply System until the requirements of the National Environmental Policy Act of 1969 have been met and a final engineering report has been prepared and submitted to the Congress for a period of not less than ninety days.

Section 4 authorizes the West River Rural Water System and the Lyman-Jones Rural Water System and is self-explanatory in nature. The Committee would note however, that the Secretary shall not obligate funds for the construction of the West River Rural Water System and the Lyman-Jones Rural Water System until the requirements of the National Environmental Policy Act of 1969 have been met and a final engineering report has been prepared and submitted to the Congress for a period of not less than ninety days.

Section 5 encourages the full consideration and incorporation of prudent and responsible water conservation measures in the operation of the three systems where such measures are shown to be economically feasible and requires the development of a water conservation plan. The Committee notes its concern with the anticipated high price of water to the consumer in an area where incomes are relatively low and urges that in all water conservation related activities that this be taken into consideration. The provisions of Section 210(c) of Public Law 97-293 (96 Stat. 1268) shall apply with respect to the Systems. Section 210(c) of Public Law 97-293 states that; "The Secretary is authorized and directed to enter into memorandums of agreement with those Federal agencies having capability to assist in implementing water conservation measures to assure coordination of ongoing programs. Such memorandums should provide for involvement of non-Federal entities such as States, Indian tribes, and water user organizations to assure full public participation in water conservation efforts".

Section 6 is self-explanatory and the Committee notes that mitigation for fish and wildlife losses incurred as a result of the construction and operation of the three systems shall be on an acre-for-acre basis, based on ecological equivalency, concurrent with project construction.

Section 7 is self-explanatory.

Section 8 is self-explanatory.

Section 9 is self-explanatory.

Section 10 is self-explanatory.

Section 11 is self-explanatory and with respect to subsection (5) the Committee wishes to make it clear that the Committee is not considering whether any such rights exist or ever existed, but simply to note that if such rights do exist, they are not affected by the Act.

Section 12 is self-explanatory and the Committee notes that the estimated cost of the Pollock-Herreid Unit of the Pick-Sloan Missouri Basin Program is \$47 million.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

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U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 10, 1988.

Hon. J. BENNETT JOHNSTON, Jr.,
*Chairman, Committee on Energy and National Resources, U.S.
Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 2772, the South Dakota Water Supply and Assistance Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 2772.
2. Bill title: South Dakota Water Supply and Assistance Act of 1988.
3. Bill status: As amended and ordered reported by the Senate Committee on Energy and Natural Resources, August 4, 1988.
4. Bill purpose: Section 3 of the bill would authorize the Secretary of the Interior, acting through the Bureau of Reclamation (BOR), to plan, construct, operate and maintain the Oglala Sioux Rural Water Supply System. The bill would prohibit obligation of construction funds for the project until certain environmental requirements have been met, and until a final engineering report on the project is submitted to the Congress. BOR would also be authorized to provide certain technical assistance to the Oglala Sioux Tribe.

Section 4 of H.R. 2772 would authorize BOR to help finance the planning and construction of the Lyman Jones and West River rural water supply systems. As in section 3, federal funds to construct these projects would only be available for obligation after certain environmental requirements have been met and only after certain reports are submitted to the Congress. This section would also prohibit federal funds from being used to operate or maintain the Lyman-Jones system.

Other sections of the bill would require nonfederal interests in the projects to develop water conservation plans, and would require BOR and the State of South Dakota to develop plans to mitigate certain previous damage to fish and wildlife. The bill would prohibit the use of water made available from the projects for irrigation purposes. Power from the Pick-Sloan project would be made available to the projects.

H.R. 2772 would authorize the appropriation of \$87.5 million for planning and constructing the Oglala Sioux, the Lyman Jones, and the West River rural water supply systems, plus or minus amounts justified by ordinary fluctuations in development costs incurred after January 1, 1987, and such sums as may be necessary for operating and maintaining the Oglala Sioux project. Finally, the bill

would repeal the authorization of appropriations for the Pollock-Herreid project in South Dakota and two related feasibility studies.

5. Estimated cost to the Federal Government:

[by fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Estimated authorization level	2.5	7.7	27.7	37.7	25.8
Estimated outlays	2.1	7.3	25.3	36.0	26.7

In addition outlays totaling approximately \$4 million would be incurred by the federal government in 1994 to complete construction of the projects authorized in the bill. Upon completion of the projects, total federal operation and maintenance expenditures for the Oglala Sioux project are estimated to total about \$0.5 million annually (in 1988 dollars).

Additional federal expenditures may be necessary to provide technical assistance to the Oglala Sioux Tribe and to mitigate fish and wildlife losses, but these costs are not expected to be significant.

The BOR currently has no plans to pursue development of the Pollock-Herreid Unit of the Pick-Sloan Missouri Basin program. Deauthorization of the funds for this project and the two feasibility studies cited in the bill are therefore not expected to result in any savings to the federal government over the next five years. When authorized in the 1970s, the project and studies had an estimated total cost of approximately \$50 million.

The costs in this bill fall within function 300.

Basis of estimate: CBO assumes that H.R. 2772 will be enacted prior to the beginning of fiscal year 1989 and that funds to begin the project will be appropriated in that year. We estimate an authorization level of \$102 million would be needed to complete these projects, based on the projects' estimated cost in 1987 of \$87.5 million and allowing for increases in costs after January 1, 1987, as provided in the bill. Outlays were estimated based on information from BOR, nonfederal project interests, and on historical spending patterns for similar reclamation projects in North Dakota. For the purposes of estimating expenditures, we assumed that there would be no major delays in the development of the project. Any delays could increase the time needed to complete the projects and its ultimate cost.

6. Estimated cost to State and local governments: Nonfederal project sponsors (i.e., local water districts) would be responsible for 35 percent of the total costs of constructing the Lyman Jones and West River rural water supply systems and 100 percent of subsequent operation and maintenance costs. The estimated nonfederal share of construction costs is expected to total about \$14 million over the next six years. Subsequent annual operation and operation costs are expected to total approximately \$0.5 million.

7. Estimate comparison: None.

8. Previous CBO estimate: On June 27, 1988, the Congressional Budget Office prepared a cost estimate for H.R. 2772 as ordered reported by the House Committee on Interior and Insular Affairs.

This estimate differs from the previous one in that the House version of the bill did not allow for any increase or decrease in the projects' authorization level based on changes in engineering cost indices.

9. Estimate prepared by: Kim Cawley.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 2772.

The Act is not a regulatory measure in the sense of imposing Government-established standards on private individuals and businesses. However, it should be noted that the water development projects authorized by the Act will be required to meet the standards normally applicable to construction of such facilities. In turn, project participants will assume the obligation for the financing requirements contained in the Act and where required the assumption of the appropriate operation, and maintenance costs of the projects.

No personal information would be collected in administering the measure. Therefore, there would be no impact on personal privacy.

The Act repeals the authority for the Secretary of the Interior to conduct two feasibility investigations which will result in a decrease in paperwork. In turn, other than the paperwork normally associated with the contracting and construction of the type of facilities authorized by the Act and the preparation of the studies authorized by the Act, little, if any, additional paperwork would result from the enactment of H.R. 2772, as reported.

EXECUTIVE COMMUNICATIONS

The pertinent legislative report received by the Committee from the Department of the Interior setting forth executive agency recommendations relating to H.R. 2772 is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, August 2, 1988.

Hon. J. BENNETT JOHNSTON,
Chairman, Committee on Energy on Natural Resources, U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for our views on H.R. 2772, an Act "To authorize the Lyman-Jones, West River, and Oglala Sioux Rural Water Development Projects."

We strongly oppose enactment of H.R. 2772 as passed by the House for the reasons stated in the Statement of Administration Policy sent to the House on June 24, 1988. Furthermore, the Department would recommend disapproval of the bill to the President should it pass the Congress in its present form.

On December 15, 1987, testimony before your subcommittee on S. 1716, the companion bill to H.R. 2772 as introduced, we stated the

Administration's opposition to S. 1416. We opposed S. 1416 as premature because the projects had not been evaluated as to their cost-effectiveness, environmental impact or their impact on other water projects in the region.

H.R. 2772 was amended in the House so that it is now substantially different from S. 1416. A number of onerous and unclear provisions have been included which we could not support under any circumstances.

First, section 4 would require 35 percent non-Federal cost sharing for the costs allocated to the non-Indian water systems. Although we are generally supportive of cost-sharing provisions, this section does not discuss the financial repayment responsibilities of all the benefiting parties, other than the cost sharing requirements for the Lyman-Jones and West River Systems. It is unclear if the funds authorized under this bill are to be fully reimbursable under Reclamation law—a policy we strongly support. Therefore, absent this clarification, we would oppose inclusion of section 4 in any legislation of this sort.

Section 5(a) would require that before Federal funds could be obligated for the projects authorized in the bill, the Secretary of the Interior (the Secretary) must make a finding that the appropriate non-Federal interests have developed and implemented water conservation programs throughout their service area that "utilizes the best practicable technology and management techniques". The Department does not object to non-Federal interests developing conservation plans, but we oppose this provision because it would require the Secretary to develop very detailed and pervasive standards and regulations to control the day-to-day use of water in every home and business in the water service areas affected. In fact, section 5(a) would seem to require the standards promulgated to state specifically which practices would meet the best practicable technology and management techniques standards established in the bill. These kinds of prescriptive regulations have proven in the past not to be workable. Furthermore, such a regulatory program would be in direct opposition to the Federalism objectives of the Administration. Therefore, we oppose this section.

We oppose section 5(b) which would authorize the Secretary to withhold water deliveries for noncompliance with the water conservation plans required under section 5(a). This authority would seem to give the Secretary the discretion to cut off service to hospitals, schools, and businesses if they do not comply with the letter of the standards promulgated by the Secretary. Furthermore, this provision would preempt the power that the States have in providing for water allocation within their borders. Therefore, we oppose this sort of provision.

We object to section 6(a), which would provide for mitigation of fish and wildlife losses incurred as a result of the projects authorized by H.R. 2772 "on an acre-for-acre basis, based on ecological equivalency." the Fish and Wildlife Coordination Act provides a process used by all Federal agencies for determining the amount of mitigation necessary to counteract Federal losses.

Section 6(b) would require the Secretary, in cooperation with the state of South Dakota and other Federal agencies, to develop and submit to Congress recommendations for financing and implement-

ing mitigation plans for two projects that are being operated by the Army Corps of Engineers. We oppose this provision. It is difficult to understand the relationship of this provision to the other provisions of H.R. 2772, since the projects that are the focus of this section are totally unrelated to the projects being authorized in this Act. Clearly, if such a provision is truly necessary, it would be more appropriate to designate the Secretary of the Army as the party responsible for developing and submitting recommendations for mitigation plans at these two projects. Finally, it is unclear how section 6(b) is to be funded because the bill only authorizes funds to provide for the activities that would be mandated by sections 3 and 4 of H.R. 2772. Therefore, we oppose this provision.

Section 7 would forbid the use of funds authorized under this bill to be used for irrigation purposes. This section is unclear as to its scope and intent. For example, this provision could be interpreted to prohibit water use for yards or home gardens. We could not support a provision of this sort absent clarification.

Section 9(a) would provide that pumping power requirements to be used in the operation of the systems authorized by sections 3 and 4 of this Act would be treated as "a project use pumping requirement of Pick-Sloan." We have some concern about authorizing the use of project power for purposes that have not been previously authorized. This may have unintended effects on other projects within Pick-Sloan.

We have concerns about subsection 11(5) and the paragraph thereafter. This language is confusing, and it is unnecessary because the first clause of section 11(5), "affect any water rights of any Indian or Indian tribe" already protects the established water rights of the Indians. Therefore, we oppose inclusion of the language after "tribe" in line 25, page 16, as well as the remainder of that section.

We oppose section 12(a), which would provide that the Pollock-Herleid Unit of the Pick-Sloan Missouri Basin Program remain an authorized feature of Pick-Sloan. This provision is in direct conflict with section 9(b) of the bill, which would reserve the power identified for future project use pumping at the Pollock-Herleid Unit for the projects to be authorized by this legislation. The result of section 12 (a) would be to maintain the possibility that the Pollock-Herleid Unit would be built in the future, but with no power available to operate the project. Not only does this provision make the legislation internally contradictory, but it could have an eventual effect on the ratemaking and repayment aspects of the entire Pick-Sloan Project.

Finally, we reiterate our basic concern with this legislation—that is premature. The Department has had no opportunity to examine these projects in the context of the Bureau of Reclamation's principles and guidelines for resources planning. We could not support any proposed water project without this examination.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint

of the Administration's program, and that enactment of H.R. 2772 would not be in accord with the program of the President.

Sincerely,

K. MITCHELL SNOW,
Deputy Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act H.R. 2272, are shown as follow (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF MARCH 11, 1976

(Public Law 94-228, 90 Stat. 209)

* * * * *

【SEC. 407. There is hereby authorized to be appropriated for construction of the Pollock-Herreid unit, as authorized in this title, the sum of \$26,000,000 (January 1975 price levels), plus or minus such amounts, if any, as may be justified by reason of changes in construction costs as indicated by engineering cost indexes applicable to the types of construction involved herein and, in addition thereto such sums as may be required for operation and maintenance of the works of said unit.】

* * * * *

ACT OF SEPTEMBER 30, 1982

(Public Law 97-273, 96 Stat. 1181)

* * * * *

【SEC. 3. (a) The Secretary is authorized in cooperation with the State of South Dakota, to conduct feasibility investigations of the following proposed water resource developments:

【(1) alternate uses of facilities constructed for use in conjunction with the Oahe unit, initial stage, James division, Pick-Sloan Missouri basin program, South Dakota;

【(2) future uses in South Dakota of water delivered by the Garrison unit, Pick-Sloan Missouri basin program, North Dakota; and

【(3) a reformulated plan for the development of the Pollock Herreid unit, South Dakota pumping division, Pick-Sloan Missouri basin program, South Dakota, including irrigation of alternative lands or reduced acreages.

【(b) The Secretary shall report to Congress the findings of the studies authorized by this section along with his recommendations.】

SEC. 3. The Secretary is authorized, in cooperation with the State of South Dakota, to conduct a feasibility investigation of the alternate uses of facilities constructed for use in conjunction with the Oahe unit, initial stage, James diversion, Pick-Sloan Missouri basin

program, South Dakota, and to report to the Congress the findings of such study along with his recommendations.



REGULATORY FAIRNESS ACT

AUGUST 25, 1988.—Ordered to be printed

Filed under the authority of the order of the Senate of August 11 (legislative day, August 10), 1988

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany H.R. 2858]

The Committee on Energy and Natural Resources to which was referred the Act (H.R. 2858) to provide for refunds pursuant to rate decreases under the Federal Power Act, having considered the same, reports favorably thereon with an amendment and recommends that the Act, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Fairness Act".

SEC. 2. REFUNDS IN PROCEEDINGS UNDER SECTION 206 OF THE FEDERAL POWER ACT.

Section 206 of the Federal Power Act (16 U.S.C. 824e) is amended as follows:

(1) At the end of subsection (a) insert:

"Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated."

(2) Designate subsection (b) as (d) and insert the following new subsections after subsection (a):

"(b) Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon

institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180 day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

"(c) Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that: (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended."

SEC. 3. LIMITATION ON AUTHORITY PROVIDED.

Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)), shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act to issue an order that: (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act are not applicable to complaints filed or motions initiated before the date of enactment of this Act pursuant to section 206 of the Federal Power Act: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.

SEC. 5. STUDY.

No earlier than three years and no later than four years after the date of enactment of this Act, the Federal Energy Regulatory Commission shall perform a study of the effect of the amendments to section 206 of the Federal Power Act made by this Act. The study shall analyze: (1) the impact, if any, of such amendments on the cost of capital paid by public utilities; (2) any change in the average time taken to resolve proceedings under section 206; and (3) such other matters as the Commission may deem appropriate in the public interest. Upon completion the study shall be sent to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives.

PURPOSE OF THE MEASURE

H.R. 2858, as amended by the Committee, would allow the Federal Energy Regulatory Commission (FERC) to grant refunds, subject to certain limitations, under section 206 of the Federal Power Act (FPA). Section 206 governs proceedings in which rate reductions are sought by wholesale power customers or through action initiated by the Commission. In either case the Commission under current law may only order the rates of public utilities to be reduced prospectively from the date of its decision that existing rates are unlawful.

H.R. 2858, as amended, would give the Commission the discretion to require public utilities to refund amounts paid in excess of just and reasonable rates for certain periods prior to the Commission's decision. Generally, the Committee amendment would permit refunds to be ordered for a period beginning with a "refund effective date" (established not less than two months or more than seven months after the filing of a complaint or publication of the Commission's notice of intent to initiate a section 206 proceeding) and ending 15 months from such date. However, in certain instances involving dilatory behavior by the public utility whose rates are at issue, refunds could be ordered for the entire period between the refund effective date and the Commission's order reducing rates.

BACKGROUND AND NEED

Section 205 of the FPA governs applications by utilities to FERC for increases in wholesale "rates and charges." Under section 205, a rate increase generally may not go into effect until at least 60 days after the utility files its application with the Commission. The Commission may suspend the effective date of the increase for up to 5 months after the 60 day period. If the Commission fails to either approve or deny the application within this time frame, the increase automatically takes effect, pending either settlement or a final decision by the Commission. Until the Commission acts on such rate, it is placed into effect subject to refund. Section 205 proceedings on average require one year for resolution. Final decisions by the Commission are retroactive to the effective date of the rate increase.

Section 206 of the FPA allows the Commission, on its own motion or pursuant to complaint, to set a "just and reasonable rate" if it finds the rate in effect to be unlawful. Under existing law, a rate reduction under section 206 differs from a rate increase under section 205 in two important ways. First, a motion or complaint for rate reduction does not take effect automatically after a given period of time as does a request for rate increase. Second, under section 206 a rate reduction is prospective only.

Resolution of section 206 proceedings requires two years on average. One probable reason for the longer period needed to resolve such proceedings is that public utilities have no incentive to settle meritorious section 206 complaints since any relief is prospective. Under present law, public utilities keep revenues collected during the pendency of a section 206 proceeding, even if those revenues are subsequently determined to be excessive. H.R. 2858 would co-

rect this problem by giving FERC the authority to order refunds, subject to certain limitations.

LEGISLATIVE HISTORY

H.R. 2858 was introduced by Representative Bruce on July 1, 1987. A companion Senate bill, S. 1567 was introduced by Senator Bumpers (for himself and Senators Chafee, Pell, Conrad, Proxmire, Weicker, and Dodd) on July 30, 1987.

The Subcommittee on Energy and Power of the House Committee on Energy and Commerce held a hearing on H.R. 2858 on October 7, 1987. The House Committee on Energy and Commerce reported H.R. 2858 favorably on October 14, 1987. The House of Representatives passed H.R. 2858 on October 27, 1987.

On November 18, 1987, the Committee on Energy and Natural Resources held a hearing on H.R. 2858 and S. 1567.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on August 3, 1988, by unanimous vote of a quorum present recommends that the Senate pass H.R. 2858, as amended, as described herein.

The rollcall vote on reporting the measure was 19 yeas, 0 nays, as follows:

YEAS

Mr. Johnston*
Mr. Bumpers*
Mr. Ford
Mr. Metzenbaum*
Mr. Melcher
Mr. Bradley*
Mr. Bingaman
Mr. Wirth
Mr. Fowler*
Mr. Conrad
Mr. McClure
Mr. Hatfield
Mr. Weicker*
Mr. Domenici*
Mr. Wallop*
Mr. Murkowski
Mr. Nickles
Mr. Hecht
Mr. Evans*

NAYS

*Indicates voted by proxy.

COMMITTEE AMENDMENT

The amendment in the nature of a substitute reported by the Committee adopts H.R. 2858 as passed by the House of Representatives with the following changes and clarifications.

Technical changes

The Committee felt that it was unnecessary to require that the complaint or motion of the Commission be stated "plainly, to the extent practicable" and so struck this phrase from the amendment to section 206(a) made by the House-passed bill. The Commission has existing authority under the Federal Power Act to implement this section and to establish appropriate standards for the filing of complaints or initiating motions. Striking the words "plainly, to the extent practicable" leaves unchanged the Commission's authority to establish filing standards, as is currently the case with section 205 and 206 proceedings.

The Committee substitute also deletes the requirement of the House-passed bill that the public utility file an answer to a motion or complaint under section 206. The Committee struck this sentence because it found it to be unnecessary. The Commission already has adequate authority under the Federal Power Act to prescribe appropriate procedural regulations. The striking of this sentence in no way affects or limits the Commission's existing authority to establish rules and regulations necessary to implement section 206.

H.R. 2858 as passed by the House provides that the Commission or a complainant has the burden of proof to show that a rate, charge or related provision is unlawful. This provision does not change existing law. Under existing section 206, the burden of proof is controlled by section 556(d) of the Administrative Procedure Act (APA), which imposes the burden on "the proponent of a rule or order" 5 U.S.C. Section 556(d).

Preference for section 206 proceedings and estimate of schedule for decision

Current law provides that the Commission shall give to section 205 proceedings preference over any other questions pending before it. The Committee substitute includes a provision requiring FERC to give the same preference to section 206 proceedings as given to section 205 proceedings. In addition, the Committee included a provision requiring FERC, if it has not decided a section 206 proceeding as of the refund effective date or a point 180 days from initiation of a section 206 proceeding (whichever is earlier), to state why it has failed to do so and to provide its best estimate as to when it expects to make a decision.

Making refunds discretionary

As passed by the House of Representatives, H.R. 2858 required refunds to be paid subject only to a narrowly drawn public interest exception. The Committee amended the House-passed bill to make the granting of refunds under section 206 discretionary so as to parallel the refund provision of section 205 of the Federal Power Act. The Committee recognizes that it may be appropriate in all instances to order refunds in the event that it is determined in a proceeding under section 206 of the Act that rates or charges are not just and reasonable.

The Committee intends the Commission to exercise its refund authority under section 206 in a manner that furthers the long-term

objective of achieving the lowest cost for consumers consistent with the maintenance of safe and reliable service. For example, the interconnection and coordination of facilities for generation, transmission and sale of electric energy is encouraged by section 202 of the Federal Power Act, and the Committee does not intend that the Regulatory Fairness Act shall discourage the coordination of facilities by electric utilities through power pooling, system integration and other arrangements designed to optimize efficiency, conserve energy and increase reliability. The Committee is aware that there may be challenges to power pooling and system integration agreements brought under section 206 of the Federal Power Act in which refunds might not be appropriate, for example, where the issue relates to cost allocation among utilities, and the bill as reported by the Committee is intended to provide the Commission with the discretion needed to deal with individual instances in which refunds would not be in the public interest.

In determining if a refund may adversely affect the public interest in the case of power pool agreements, the Committee expects the Commission to consider whether, and the extent to which, a refund would adversely affect decisions made on the basis of energy pricing provisions of such pooling agreements or will impose a substantial burden on the pool in comparison with the benefits of refunds to consumers.

In addition to certain situations involving power pooling, there may be others in which the public interest would not be served by requiring refunds under section 206. Because the potential range of these situations cannot be fully anticipated, no attempt has been made to enumerate them here. In any case, the Committee generally expects the Commission to grant refunds under section 206 with comparable frequency to its granting of refunds under section 205.

Limitation on refunds

A. 15 month limitation

While giving FERC the discretionary authority to grant refunds, the Committee amendment in several respects limits the time period during which refund liability can accrue. In general, refunds may only be ordered for amounts paid in excess of lawful rates during the period within 15 months of the refund effective date. However, if the Commission determines at the end of a section 206 proceeding that the proceeding was not resolved within the 15 month proceeding primarily because of dilatory behavior by the public utility whose rates are at issue, the Commission is empowered to order refunds of all amounts paid in excess of just and reasonable rates for the entire period of time between the refund effective date and the conclusion of the proceeding.

B. Registered holding companies

In addition to limiting the time periods for which refunds may be ordered, the Committee amendment generally exempts registered electric utility holding companies from paying refunds at all under section 206 when such refunds would result from reallocation of cost responsibility among operating subsidiaries of such companies, rather than a decrease in overall system revenues. Refunds in such

reallocation situations may unfairly burden shareholders because of the inability of a holding company's subsidiaries to recover rate increases for past periods along with the rate decreases upon which refunds are based. This inability can result from operation of the filed rate doctrine at both the wholesale and retail jurisdictional levels and in effect create a "trapping" of costs. The filed rate doctrine holds that a public utility may not charge rates higher than those filed with the relevant regulatory body. The recovery of rate increases for past periods (generally in the form of a prospective surcharge on otherwise applicable rates) is likely to be inconsistent with the doctrine.

However, the Committee recognizes that the equitable basis for exempting registered companies from refund liability in reallocation situations is removed to the extent that a holding company is in fact kept whole with respect to revenues for past periods. Although the Committee believes this event is unlikely to occur due to operation of the filed rate doctrine, exemption from refund liability in such situations would be inappropriate. Thus, the Committee substitute provides that the exemption from refund liability does not apply if the Commission determines that the holding company would not suffer any reduction in revenues resulting from an inability to achieve retroactive rate increases.

The Committee also recognizes that some situations involving registered holding companies may involve both reallocation of system cost responsibility and a reduction in overall system revenues. In such instances, the Committee does not intend for the exemption from refund liability to insulate a holding company from the portion of a Commission order requiring a decrease in system revenues.

Deletion of exemption for filing fees

As passed by the House of Representatives, H.R. 2858 exempted parties filing complaints for rate decreases from paying FERC filing fees. The Committee concludes that this exemption would possibly serve to encourage frivolous filings. Furthermore, as a result of Section 3401 of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509), the administrative costs associated with section 206 complaints would have to be made up in the filing fees paid by other parties before FERC. For these reasons, the Committee struck the filing fees exemption.

Disclaimer of change in jurisdiction

Certain parties are currently raising legal challenges to FERC's authority to reallocate cost responsibility among holding company subsidiaries. The Committee substitute clarifies the nothing in the Regulatory Fairness Act either expands or diminishes whatever authority FERC would otherwise have to order reallocation.

Effective date

The Committee substitute makes it clear that any section 206 proceeding under way at FERC at the time of the enactment of the Regulatory Fairness Act is left undisturbed; existing complaints are to be processed by FERC under existing law. However, this pro-

vision does not preclude the refile of a complaint under revised section 206 if the complainant so wishes.

Study

The Committee substitute requires FERC within four years and no earlier than three years from the date of enactment to perform a study of the amendments to section 206 made by the Regulatory Fairness Act. The study is to analyze: (1) the impact of section 206 amendments on the cost of capital paid by public utilities; (2) any change in the average time taken to resolve section 206 proceedings; and such other matters as the Commission deems appropriate in the public interest.

Effect on contractual rights

The Committee is aware of the rules of law which have been developed by judicial and administrative decisions concerning the ability of parties to contracts and rate schedules to seek and obtain modifications of those agreements. This was discussed in the testimony of Arizona Public Service Company and Southern California Edison Company. The changes made by this Act to Section 206 of the Federal Power Act do not affect those rules of law or the legal bases for the Commission to modify contracts or rate schedules which permit changes by the parties under section 206; nor do they affect the rights and obligations of any party to such contract or rate schedule.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 1988.

Hon. J. BENNETT JOHNSTON, Jr.,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC

DEAR MR. CHAIRMAN: The Congressional Budget office has reviewed H.R. 2858, the Regulatory Fairness Act, as amended and ordered reported by the Senate Committee on Energy and Natural Resources on August 3, 1988. CBO estimates that enactment of this bill would result in no significant cost to the federal government, and would not affect the budgets of state or local governments.

H.R. 2858 would amend the Federal Power Act to require the Federal Energy Regulatory Commission (FERC) to establish a refund effective date for any proceedings instituted under section 206 of the Federal Power Act. The bill would also exempt utilities that are part of a holding company from paying refunds that would otherwise be required under this bill, is such refunds would result in a reallocation of cost responsibilities among subsidiary companies rather than a decrease in overall system revenues. These provisions would affect refunds paid by utilities to wholesale power customers, and would not affect the federal budget.

H.R. 2858 would also require FERC to complete a study of the impacts of these amendments to section 206 of the Federal Power Act three years after enactment of the bill. Based on information from FERC, CBO estimates this study would cost less than \$100,000 in fiscal year 1992.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kim Cawley, who can be reached at 226-2860.

Sincerely,

JAMES L. BLUM,
Acting Director.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 2858.

The bill gives the Federal Energy Regulatory Commission the discretion to order refunds of amounts paid to public utilities by their customers in excess of lawful rates. Because refunds would only be ordered as part of rate reduction proceedings which are provided for under current law, enactment of H.R. 2858 would create little additional regulatory burden for any party.

No personal information would be collected in administering the program. Therefore, there would be no impact of personal privacy.

Little additional paperwork would result from the enactment of H.R. 2858, as reported.

EXECUTIVE COMMUNICATIONS

On November 16, 1987, the Committee on Energy and Natural Resources requested legislative reports from the Federal Energy Regulatory Commission and the Office of Management and Budget setting forth executive views on H.R. 2858. These reports had not been received at the time the report on H.R. 2858 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, H.R. 2858, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

(16 U.S.C. 824e)

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FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION
OR TRANSPORTATION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. *Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.*

(b) *Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180 day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden or proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen month period primarily because of dilatory*

behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that: (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

[(b)] (d) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

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